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VIA ECF & EMAIL

The Honorable Katherine Polk Failla
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: United States v. Beniquez
18 Cr. 236 (KPF)

Dear Judge Failla:

I represent Armando Beniquez, the defendant in the above-referenced matter. Mr. Beniquez was sentenced by the Court on December 10, 2019, to 24 months imprisonment and he self-surrendered to the Metropolitan Correctional Center on February 21, 2020. The purpose of this letter is to respectfully request that the Court grant Mr. Beniquez's temporary release to home incarceration until the current COVID-19 pandemic has ended, pursuant to 18 U.S.C. § 3582(c)(1)(A), or until he is designated to the facility where he will serve the majority of his sentence. The BOP sent a list of inmates who were deemed "high risk," that is to say vulnerable to COVID-19, based on the CDC's criteria to the Federal Defenders and Mr. Beniquez was on that list. Mr. Beniquez suffers from severe chronic asthma and prior to his incarceration, had an albuterol pump. While on pretrial release, he went to the hospital five times as a result of severe asthma attacks. Currently, Mr. Beniquez has not been provided an asthma pump. He has asked both jail and medical personnel for access to a pump but as of April 1, 2020, has not yet received one. Additionally, as of March 30, 2020, he has been experiencing chest pains but has not been seen by a doctor regarding his condition despite notifying jail personnel. Counsel proposes that Mr. Beniquez be released only temporarily subject to the conditions of home incarceration and electronic monitoring.

On March 31, 2020, and again on April 2, 2020, counsel submitted a request to the Warden at the MCC asking that the BOP move the sentencing court to temporarily release Mr. Beniquez to home incarceration until the current COVID-19 pandemic has ended, pursuant to 18 U.S.C. § 3582(c)(1)(A). However, counsel has not received a response from the MCC. Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), I am respectfully requesting that the Court temporarily release Mr. Beniquez to home incarceration with electronic monitoring

because “extraordinary and compelling reasons” exist to warrant such a modification of his sentence. This provision, as modified by the First Step Act of 2018, empowers the Court to grant compassionate release “upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier. § 3582(c)(1)(A). The Court should deem the exhaustion/30-day requirement met because the BOP has known about the risk of COVID-19 for more than 30 days and has failed to adequately protect the health of the inmates in its care. In the alternative, the Court should waive the exhaustion/30-day requirement because of the exigency of this request.¹

1. Mr. Beniquez should be granted temporary release to home incarceration because his presence at the MCC heightens the risk of infection to himself, other inmates at the MCC, MCC staff, and the New York City community.

New York City is facing a serious and urgent public health crisis. On March 11, 2020, the World Health Organization officially classified COVID-19, the respiratory illness caused by a novel strain of coronavirus, as a global pandemic.² On January 21, 2020, Washington State announced the first confirmed case in the United States.³ Only two months later, COVID-19 has infected over 41,701 people across the United States, leading to at least 537 deaths.⁴

The exponential rate of coronavirus infection is unparalleled. The first case of coronavirus in New York State was announced on March 1, 2020. Less than two weeks later, New York State reported 325 positive cases. To date, the state has amassed 92,381 confirmed cases of the virus, with 2,468 deaths.⁵ In a five-day period between March 15 and March 20, New York State experienced a ten-fold increase in new confirmed cases of COVID-19.⁶ As of March 23, 2020 in New York City, there are 13,115 positive cases and

¹ Order by Judge Analisa Torres, 17 Cr. 513 (AT), in which the Court waived the exhaustion/30-day requirement “in light of the extraordinary threat posed... by the COVID-19 pandemic.”

² WHO Characterizes COVID-19 as a Pandemic, World Health Organization (Mar. 11, 2020), at <https://bit.ly/2W8dwpS>.

³ First Patient With Wuhan Coronavirus Is Identified in the U.S., The New York Times (Jan. 21, 2020), at <https://www.nytimes.com/2020/01/21/health/cdc-coronavirus.html>.

⁴ See Coronavirus Map: Tracking the Spread of the Outbreak, The New York Times (March 23, 2020), at <https://nyti.ms/2t6WE75> (updating regularly).

⁵ Id.

⁶ Watch How the Coronavirus Spread Across the United States, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/interactive/2020/03/21/us/coronavirus-us-cases-spread.html>.

125 deaths resulting from the virus.⁷ Most cases are in men in their 30s and 40s.⁸ New York City is an epicenter of the pandemic.⁹

In response to this public health crisis, Gov. Andrew Cuomo declared a State of Emergency in New York State on March 7, 2020.¹⁰ Mayor Bill de Blasio declared a State of Emergency in New York City on March 12, 2020, banning gatherings of more than 500 people.¹¹ On March 20, 2020, Governor Cuomo directed all non-essential workers to work from home, requiring individuals to maintain six feet of distance between each other.¹² The same day, the Federal Emergency Management Agency (FEMA) declared New York “a major disaster.”¹³

While adults over sixty years old and people with chronic medical conditions are at a heightened risk for COVID-19, young, otherwise healthy individuals are not immune from infection. Mr. Beniquez suffers from severe asthma which greatly increases his risk of getting very sick from COVID-19 because the illness can affect the respiratory tract. Individuals with asthma have a greater chance of contracting pneumonia and acute respiratory disease as a result of COVID-19. According to the Centers for Disease Control and Prevention (CDC), nearly 40% of patients hospitalized from coronavirus were 20 to 54 years old.¹⁴ In New York, 18- to 49-year-olds comprise more than half of all cases in the state. In New York City, 57% of patients are male.¹⁵ With thousands of confirmed cases in New York City that indicate community spread, we must take every necessary action to protect vulnerable populations and the community at large.

a. Conditions of pretrial confinement create the ideal environment for the transmission of coronavirus.

“Prisons are petri dishes for contagious respiratory illnesses.”¹⁶ Inmates cycle in and out of Bureau of Prisons (BOP) pretrial facilities from all over the world and the

⁷ Coronavirus, New York City Health (Mar. 23, 2020), at <https://on.nyc.gov/39ME7wU> (updating regularly).

⁸ Id.

⁹ Coronavirus in N.Y.C.: Region Is Now an Epicenter of the Pandemic, The New York Times (Mar. 23, 2020), at <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html?action=click&module=Spotlight&pctype=Homepage>.

¹⁰ At Novel Coronavirus Briefing, Governor Cuomo Declares State of Emergency to Contain Spread of Virus, New York State (Mar. 11, 2020) at <https://on.ny.gov/2TKzloz>.

¹¹ DeBlasio Declares State of Emergency in NYC, and Large Gatherings Are Banned, The New York Times (Mar. 12, 2020).

¹² Novel Coronavirus (COVID-19), New York State Department of Health (Mar. 21, 2020), at <https://on.ny.gov/2vffQvy> (updating regularly).

¹³ President Donald J. Trump Approves Major Disaster Declaration for New York, FEMA (Mar. 20, 2020), at <https://www.fema.gov/news-release/2020/03/20/president-donald-j-trump-approves-major-disaster-declaration-new-york>.

¹⁴ Younger Adults Make Up Big Portion of Coronavirus Hospitalizations in U.S., The New York Times (Mar. 20, 2020), at <https://www.nytimes.com/2020/03/18/health/coronavirus-young-people.html>.

¹⁵ See NYC Dept’ of Health Daily Data, March 23, 2020, available at <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary.pdf>.

¹⁶ Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark->

country, and people who work in the facilities leave and return daily, without screening or testing. On March 21, 2020, an inmate at Metropolitan Detention Center (MDC) tested positive for the coronavirus.¹⁷ The individual “complained of chest pains on Thursday, a few days after he arrived at the facility.”¹⁸ When he first arrived at the facility, according to authorities, he was asymptomatic. The effect on the population at MDC remains to be seen, but as the chief physician at Rikers Island publicly cautioned, “[a] storm is coming.”¹⁹ As of today, at least 4 inmates at MCC have been diagnosed with COVID-19 and the BOP has indefinitely suspended inmate movement, making it unlikely that Mr. Beniquez will be transported to his designated facility any time soon.²⁰

Given what we know about COVID-19, the BOP’s quest to contain the infection seems futile. Coronavirus is highly contagious. On average, one person with the coronavirus will infect between two to three other individuals.²¹ But public health experts agree that incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe;” “infection control is challenging in these settings.”²²

Internationally, prisons have spawned rapid spread of COVID-19. In China, officials confirmed 500 cases in prisons.²³ Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.²⁴ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the “deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”²⁵

warning-on-coronavirus-and-incarceration. See also Joseph A. Bick (2007). Infection Control in Jails and Prisons. *Clinical Infectious Diseases* 45(8):1047-1055, at <https://doi.org/10.1086/521910>.

¹⁷ See 1st fed inmate tests positive for coronavirus, A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

¹⁸ *Id.*

¹⁹ ‘A Storm Is Coming’: Fears of an Inmate Epidemic as the Virus Spreads in the Jails, The New York Times (Mar. 21, 2020), at <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

²⁰ See *United States v. Nancy Credidio*, 19 Cr. 111 (PAE), Order of the Court filed April 2, 2020.

²¹ The average coronavirus patient infects at least 2 others, suggesting the virus is far more contagious than flu, Business Insider (Mar. 17, 2020), at <https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3>.

²² “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (Mar. 2, 2020), at <https://bit.ly/2W9V6oS>.

²³ Rhea Mahbubani, Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials, Business Insider (Feb. 21, 2020), at <https://bit.ly/2vSzSRT>.

²⁴ Claudia Lauer and Colleen Long, US Prisons, Jails On Alert for Spread of Coronavirus, The Associated Press (Mar. 7, 2020), at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

²⁵ Jennifer Hansler and Kylie Atwood, Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak, CNN (Mar. 10, 2020), at <https://cnn.it/2W4OpV7>.

On March 20, 2020, the New York City Department of Correction announced that one inmate and seven staff members in the city jails had been diagnosed with coronavirus.²⁶ One day later, on March 21, 2020, it became clear that no fewer than 38 people tested positive.²⁷ At least 58 additional people are being held in contagious disease and quarantine units in the city's jail system.²⁸ But the cases are not abating. The chairwoman of the New York City Board of Correction urged, "The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them."²⁹ The New York City Bar Association has called on "all actors in the criminal justice system" to "swiftly move to reduce the density at all New York City area jails and prisons to prevent or slow the spread of the virus."³⁰

b. The MCC remains unprepared for a coronavirus outbreak.

As of April 1, 2020, counsel was informed by Mr. Beniquez that he understood that 4 inmates have tested positive in the 11S unit and 3 inmates have tested positive in the 11N unit, which is Mr. Beniquez's unit. Further, Mr. Beniquez's cellmate, Dwayne Conley, had a fever of 103 degrees and was then removed from his cell. Mr. Beniquez's cell has not been cleaned or sanitized since Mr. Conley was removed. Mr. Beniquez has additionally informed me that his unit is locked down all day and inmates are only permitted one phone call per day. Every time that an inmate who is symptomatic is removed from a unit, the unit is locked down for another 14 days with no movement in or out, resulting in Mr. Beniquez sitting in an unclean, un-sanitized cell for 14 days at a time.

Inmates at the MCC -- a massive pretrial detention facility housing approximately 700 people -- are at grave risk of contracting the virus.³¹ The medical care at the MCC has repeatedly failed to adequately address even routine medical conditions, including for Mr. Beniquez;³² in times of crisis, medical care at the facility has halted entirely.³³

²⁶ 38 positive for coronavirus in NYC jails, including Rikers, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See Statement of the New York City Bar Association Urging Immediate Steps to Reduce Prison and Jail Populations to Prevent Spread of the Covid-19 Virus at 2-3, available at https://s3.amazonaws.com/documents.nycbar.org/files/COVID_Prisons_Jails_Statement_FINAL.pdf.

³¹ See U.S. v. Shakeil Chandler, 19 Cr. 867 (PAC) ECF No. 16 at 12-22 (S.D.N.Y. March 23, 2020): Exhibit A - Affidavit of Jonathan Giftos, M.D. (hereinafter "Giftos Affidavit").

³² See e.g., National Association of Women Judges (NAWJ) Women in Prison Committee (WIP) Second Visit to BOP's Metropolitan Detention Center (MDC), Brooklyn, New York, June 3, 2016, at <https://bit.ly/39JRhdW>.

³³ According to the Federal Defenders, during the recent eight-day lockdown at the MCC, inmates on one unit reported having been forced to share one toilet, one shower, and one sink among twenty-six people, and were prevented from washing their clothing: prime conditions for the spread, rather than containment, of infectious disease. On other units, toilets overflowed in two-man cells, spreading raw sewage. Inmates with serious medical conditions, including AIDS and anemia, were denied medications or medical care. Female inmates were denied feminine hygiene supplies. No clean drinking water was provided; inmates were forced to drink from their bathroom sinks.

On March 13, 2020, nearly two weeks after the first confirmed case of coronavirus in New York State, the Bureau of Prisons announced a 30-day suspension of all visits to all federal correctional facilities. But prohibiting visits to correctional facilities is insufficient to stop the spread of illness. “[T]here is no way to stop the daily flow of guards, teachers, food service and healthcare workers. Someone is certain to bring the virus in and take it back out while they are asymptomatic.”³⁴

To prevent new infections, the CDC strongly recommends (1) thorough and frequent handwashing, (2) cleaning surfaces with Environmental Protection Agency approved disinfectants, (3) keeping at least six feet of space between people, and (4) social distancing.³⁵

To date, the MCC has not met the most basic recommendations of the CDC for preventing the spread of coronavirus. Maintaining six feet of distance from other inmates is all but impossible in a correctional facility where most individuals, including Mr. Beniquez, are double-bunked in a single cell, sharing a toilet and sink with a cellmate and a common shower with at least sixteen other people. In the days since March 13, the MCC has not issued sufficient hand soap to inmates. Because commissary is currently closed, the limited soap available must be used not only for handwashing, but also for showers and washing clothing; no one is allowed to purchase additional soap.

In addition to unhygienic living conditions, frequent movement between units at the MCC over the past several weeks will spread the virus. In New York City jails, where there have been at least 38 confirmed cases of coronavirus, the Board of Correction chairwoman stated, “[i]t is likely that these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff.”³⁶ The MCC will encounter the same obstacle to cabining the spread. For eight days at the end of February through the beginning of March, the MCC was on total lockdown. During that period, inmates report that they were frequently shuttled among various housing units as officers searched for contraband. This movement once the spread of the virus was underway likely facilitated further spread at the MCC.

The MCC’s solution to curtailing all visits for 30 days -- providing additional phone minutes at no charge -- creates yet another public health hurdle. The MCC has given each inmate an additional 200 phone minutes, bringing the total to 500 minutes. But with the extra phone time comes swarms of crowds. The phones in Mr. Beniquez’s unit remain in constant use and are inadequately cleaned, creating more opportunity to spread infection.

With each additional arrest comes increased risk of spreading the virus in MCC. Individuals who are newly arrested and potentially exposed to coronavirus, if they are not

³⁴ Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails and prisons, Los Angeles Times (Mar. 20, 2020), at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration>.

³⁵ See Giftos Affidavit.

³⁶ 38 positive for coronavirus in NYC jails, including Rikers, ABC News (Mar. 21, 2020), at <https://abcnews.go.com/US/wireStory/38-positive-coronavirus-nyc-jails-including-rikers-69731911>.

symptomatic, will be brought into the facility. There, they are held with the existing population, potentially transmitting COVID-19 to a populace held in close quarters with unsanitary conditions. These conditions are ripe for the spread of infection: The individual who tested positive for coronavirus at the MDC on March 21 first was incarcerated only a few short days before becoming symptomatic.³⁷

Notwithstanding a confirmed case of coronavirus at MDC, the MCC remains unprepared for an outbreak. According to the Federal Defenders, the facility does not currently have the ability to test for coronavirus and there are no general screening protocols in place. Only if an inmate self-reports symptoms will he be screened for the virus. If symptomatic, the inmate will be “isolated” in his cell, exposing cellmates to risk. The MCC has only thirty N-95 masks and no one, including correction officers, is allowed to have hand sanitizer because it is alcohol based. The use of gloves remains discretionary among officers.

Given what we know about coronavirus, conditions of confinement generally, and the lack of preparedness at the MCC, the fact that there are no confirmed cases of COVID-19 to date at the MCC reflects the fact that the MCC lacks the ability to test for the virus. It does not mean that no one in the facility is infected.

c. The federal judiciary has begun to set bail conditions for previously detained individuals in light of the coronavirus.

The judiciary has recently begun to recognize and address this crisis. On March 12, 2020, Magistrate Judge Orenstein denied a remand application, holding that increasing the population of the Metropolitan Detention Center could present a “danger to the community” -- the staff and inmates inside the jail—by potentially bringing the virus into the facility. *See United States v. Raihan*, 20-CR-68 (BMC) (Mar. 12, 2020). A week later, conditions worsened exponentially.

On March 19, 2020, thirteen days after having remanded defendant Dante Stephens, Judge Nathan reversed a prior bail decision “in light of circumstances that have changed since the March 6 hearing,” namely, “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic.” *U.S. v. Stephens*, 15-CR-95 (AJN) (Mar. 19, 2020). In setting bail, Judge Nathan noted that “[a] comprehensive view of the danger the Defendant poses to the community requires considering all factors,” including COVID-19. *Id.* Similarly, on March 19, 2020, the threat of coronavirus led Judge Ramos to release a formerly detained individual on bail. *See U.S. v. Santiago Ramos*, 20-CR-04 (ER). Additionally, in the Eastern District of New York, Judge Chen Ordered the defendant released from BOP custody as a result of the current pandemic. *See United States v. Webb*, 15-CR-252 (PKC).

³⁷ See [1st fed inmate tests positive for coronavirus](https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042), A.P. News (Mar. 21, 2020), at <https://apnews.com/ec49cc7f4d1b00bc5010dfb6d935e042>.

In the throes of this public health crisis, the Court should temporarily release Mr. Beniquez to protect his physical health.

Conclusion

Given the unprecedented and extraordinarily dangerous situation COVID-19 presents, I move this Court for Mr. Beniquez's temporary release to home incarceration with electronic monitoring until the current health pandemic has ceased. The Court's time and consideration of this request are greatly appreciated.

Respectfully submitted,

/ s /

Margaret M. Shalley

cc: AUSA Ryan Finkel (*via ECF and email*)